

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

01 0820002

AT RICHMOND, August 8, 2001

CF

PETITION OF

ROBERT WEINGARTEN,
GERRY R. GINSBERG
and
LEONARD GUBAR

CASE NO. INS010062

For issuance of temporary restraining
order, preliminary injunction and
other reliefFINAL ORDER

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On March 21, 2001, the Petitioners filed their "Petition for Payment and Declaration of Priority Status" seeking an order requiring payment from the Receivership Estate of Fidelity Bankers Insurance Company (Fidelity Bankers) of the sum of \$3.5 million as an administrative expense having priority status under § 38.2-1509, Code of Virginia. The Petition also requested a finding that the Plan Dividend provision of the Rehabilitation Plan approved by this Commission in 1992 be now declared an "interest" payment to a class of policyholders and thus subordinated to the claims of all other creditors. Petitioners simultaneously filed a Motion for a Temporary Restraining Order to enjoin the Deputy Receiver from making payments from the Receivership Estate to the extent that there would be insufficient funds to fully satisfy their \$3.5 million claim.

The Deputy Receiver's response included a Motion to Dismiss and an extensive memorandum to which Petitioners responded at length, filing as well a Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction. Finally, the Deputy Receiver filed a Reply.

Petitioners have requested an early hearing on their Petition and Motion for Temporary Restraining Order.

The Petitioners' claim is based on a \$3.5 million Stipulated Judgment entered against the Deputy Receiver by the U.S. District Court for the Eastern District of Virginia on January 19, 2001. The Judgment is the result of Petitioners' Counterclaim for indemnification of expenses of litigation incurred as former directors of Fidelity Bankers Life Insurance Company. It stands as a determination by a court of competent jurisdiction that the Petitioners are due from the Receivership Estate the amount in controversy, a determination which was reached with the express concurrence of the Deputy Receiver. Under these circumstances, we find that payment of the Judgment and its priority among creditors is in no way affected by the Receivership Appeal Procedure as argued by the Deputy Receiver.

The single issue of fact presented in this proceeding concerns a sharp disagreement between counsel for the parties over the content of their communications taking place at the time they were negotiating the agreement leading to the Stipulated Judgment. Petitioners contend that counsel for the Deputy Receiver advised that appeal under the Receivership Appeal Procedure was unnecessary in view of the parties' settlement agreement. Counsel for the Deputy Receiver emphatically disagrees.

Our finding that the Receivership Appeal Procedure is not applicable under the undisputed facts of this case renders an evidentiary hearing unnecessary.

The Final Judgment of the U.S. District Court specifically reserved for this Commission's determination the priority among creditors to be accorded the Judgment.

The priority issue has been extensively briefed by the parties and numerous case decisions have been cited and discussed.

If the Federal Court Judgment is to be paid as an administrative expense, as the Petitioners contend, it would have a superior payment priority over policyholders and other creditors. Petitioners' request for injunctive relief seeks to forestall any further payments to policyholders until the \$3.5 million is reserved and paid in satisfaction of the Judgment. If this issue is decided as the Petitioners contend, the Deputy Receiver would be directed to satisfy the Judgment as an expense of administration, a result which would be the equivalent of an injunction. (The Deputy Receiver advises that no distribution of planned dividend payments has been made since the filing of this Petition.)

However, if it is decided that the payment of the Judgment occupies a priority status common to claims of general creditors, the Petitioners then urge, in effect, that our Final Order entered September 29, 1992, approving a Plan Dividend as a part of a Rehabilitation Plan should be altered so that the Petitioners' Judgment, if not all general creditors, be satisfied before any further payments on account of the Plan Dividend are made.

This Commission has no authority to modify a Final Order after 21 days following its entry, much less almost nine years thereafter. Even if we had such authority, we would decline to impose such an extremely unfair and chaotic result on the many policyholders who made the choice to opt in to the Rehabilitation Plan understanding that it provided the possibility of enhanced payments to compensate for the loss of interest and liquidity during the Receivership. If the Plan Dividend may not be paid under "governing law" as asserted by the Petitioners, and thus unlawful at the time

of implementation, it is difficult to comprehend just how the Deputy Receiver is to go about recovering from policyholders or their estates the amounts already distributed.

The numerous cases cited by the parties bearing on the issue of whether the Petitioners' claim is an expense of administration of the Receivership arise for the most part out of federal bankruptcy proceedings. As such, they might provide helpful guidance, but we find no clear weight of authority as suggested by the Petitioners. Instead, the cases reach different results, sometimes due to factual distinctions that seem to bear on the relative equities of the contending parties. A number of the cited cases simply appear to be in irreconcilable conflict concerning the issue of classifying directors' indemnification claims as administrative expenses.

There is no suggestion that the action brought against the Petitioners alleging various counts of misconduct was frivolous litigation instigated by the Deputy Receiver. It does not appear that his action was inconsistent with his duty to recover assets belonging to the Receivership Estate. The Petitioners' right to indemnification arises by virtue of their service as directors of Fidelity Insurance Company prior to the Receivership, not because of services benefiting the Estate thereafter. Under these circumstances the Petitioners are judgment creditors equal in status with other creditors, but not creditors to be paid as part of the expense of administration of the Receivership.

We find that the Petitioner's Judgment should be paid as an obligation due a general or "other" creditor in accordance with § 38.2-1509(B)1(v).

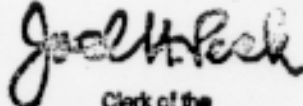
It is therefore ORDERED that:

1. The Petitioners' requests for injunctive relief and hearing be, and the same are hereby, DENIED.

2. The Deputy Receiver's Motion to Dismiss be, and the same is hereby,
DENIED.
3. The Petitioners' \$3.5 million claim is to be, and is hereby assigned, the
priority status of other creditors as set forth in § 38.2-1509(B)1(v).
4. The papers herein shall be placed in the file for ended cases.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to
W. David Paxton, Esquire, Gentry, Locke, Rakes & Moore, P.O. Box 40013, Roanoke,
Virginia 24022-0013, counsel for Petitioners; Alfred W. Gross, Deputy Receiver of First
Dominion Mutual Life Insurance Company and Trustee of Fidelity Bankers Life
Insurance Company Trust, Tyler Building, 6th Floor, 1300 East Main Street, Richmond,
Virginia 23219; Howard W. Dobbins, Esquire, Williams, Mullen, Clark & Dobbins, 1021
East Cary Street, 16th Floor, Richmond, Virginia 23219 and Patrick H. Cantilo, Esquire,
Cantilo & Bennett, LLP, 7501 North Capital of Texas Highway, Suite 200, Austin, Texas
78731, counsel for the Deputy Receiver of First Dominion Mutual Life Insurance
Company and Trustee of Fidelity Bankers Life Insurance Company Trust.

A True Copy
Tested


Clerk of the
State Corporation Commission